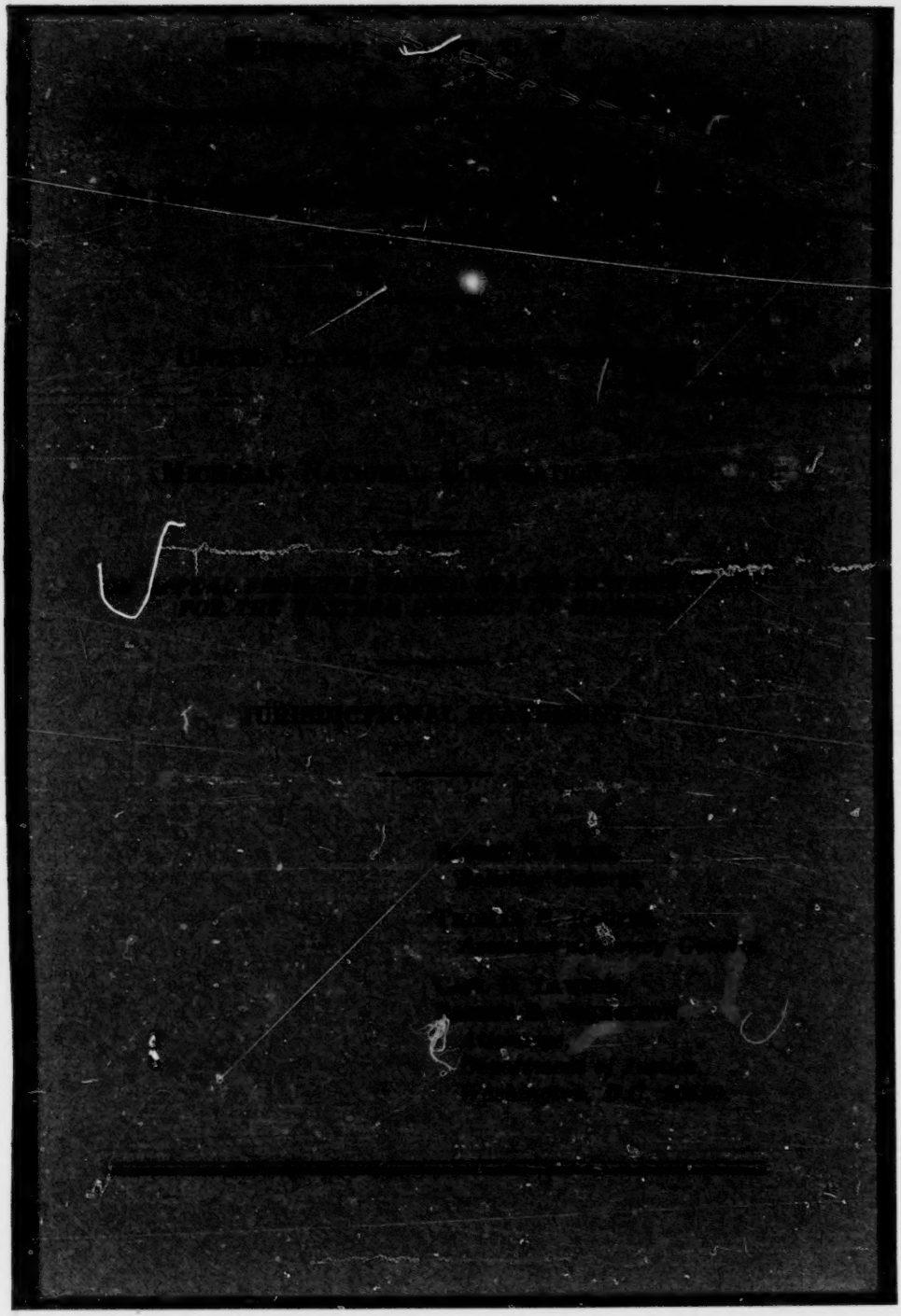

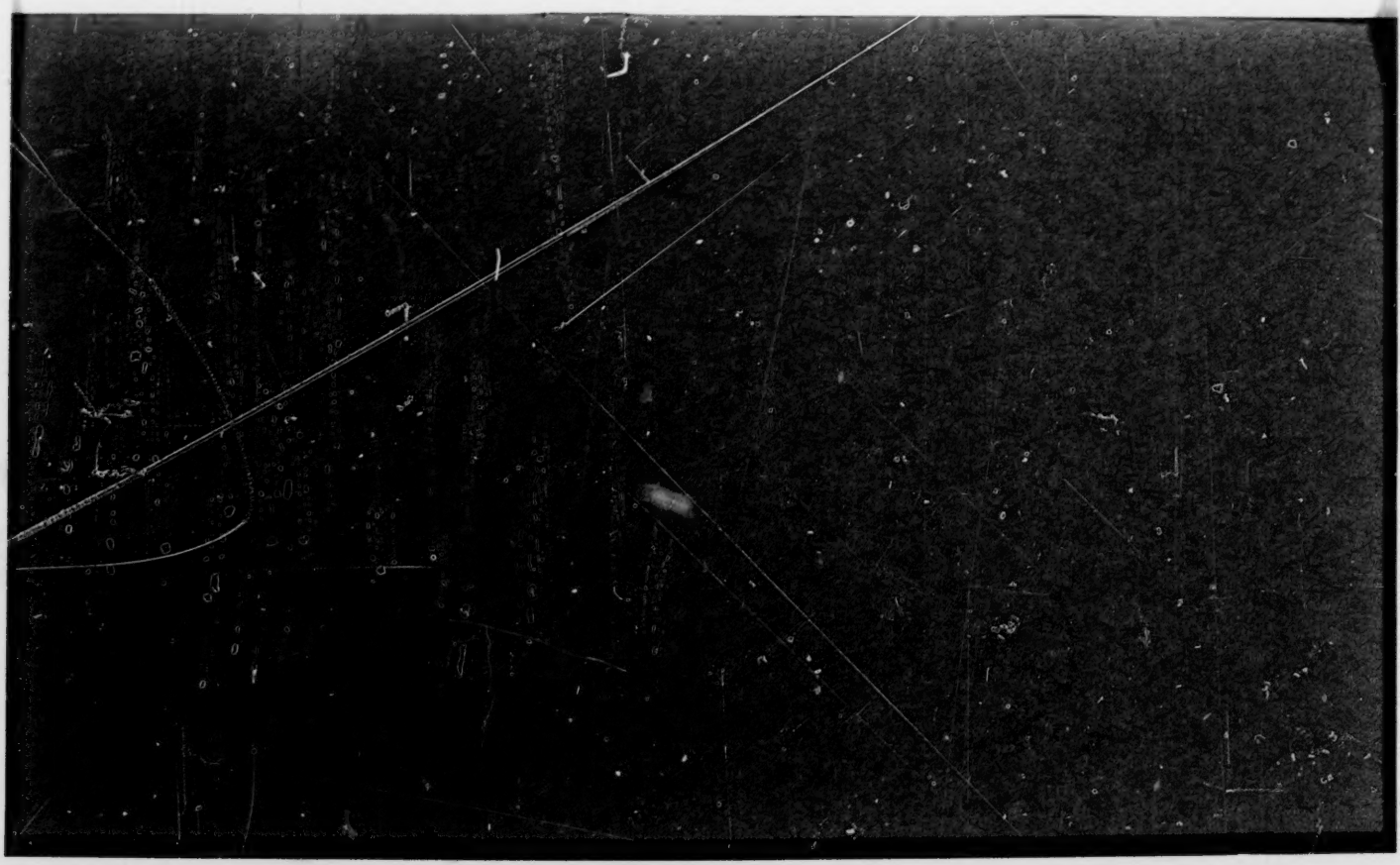

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

UNITED STATES OF AMERICA, APPELLANT

v.

MICHIGAN NATIONAL CORPORATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*, pp. 1a-9a) is not yet officially reported.

JURISDICTION

The judgment of the district court (App. B, *infra*, pp. 10a-11a) was entered on February 19, 1974.[1] The notices of appeal to this Court (App. C, D, and E,

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[1] The judgment dismissed three separate actions and a notice of appeal was filed in each action.

infra, pp. 12a-14a) were filed on April 15, 1974. The jurisdiction of the Court is conferred by Section 2 of the Expediting Act, 15 U.S.C. 29. *United States* v. *Phillipsburg National Bank*, 399 U.S. 350.

QUESTION PRESENTED

The Bank Holding Company Act provides that antitrust suits challenging a bank holding company acquisition must be filed within 30 days after the Board of Governors of the Federal Reserve System approves a proposed acquisition. The Bank Merger Act provides that antitrust suits challenging a bank merger must be filed within 30 days after the Comptroller of the Currency approves a proposed merger. These cases concern merger-acquisition transactions involving applications to both agencies for approval. Within 30 days after the Reserve Board approved the transactions, but before the Comptroller had acted, the government filed suits challenging the acquisitions under the antitrust laws.

The question presented is whether the district court should have stayed the proceedings until the Comptroller acts, instead of dismissing "without prejudice" the government's suits as premature.

STATUTES INVOLVED

Section 11(b) of the Bank Holding Company Act of 1956, 80 Stat. 240, as amended, 12 U.S.C. 1849 (b), provides in pertinent part:

> The Board [of Governors of the Federal Reserve System] shall immediately notify the Attorney General of any approval by it pursuant to section 1842 of this title of a proposed acquisition, merger, or consolidation transaction, and such transaction may not be consummated before the thirtieth calendar day after the date of approval by the Board. Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction approved under section 1842 of this title shall be commenced within such thirty-day period. The commencement of such an action shall stay the effectiveness of the Board's approval unless the court shall otherwise specifically order. * * * Upon the consummation of an acquisition, merger, or consolidation transaction approved under section 1842 of this title in compliance with this chapter and after the termination of any antitrust litigation commenced within the period prescribed in this section, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15 * * *.

Sections 6 and 7 of the Bank Merger Act of 1966, 80 Stat. 8, as amended, 12 U.S.C. 1828(c)(6) and (7), provide in pertinent part:

> (6) The responsible agency shall immediately notify the Attorney General of any approval by it pursuant to this subsection of a proposed merger transaction. * * * [T]he transaction may

not be consummated before the thirtieth calendar day after the date of approval by the agency.

(7)(A) Any action brought under the antitrust laws arising out of a merger transaction shall be commenced prior to the earliest time under paragraph (6) at which a merger transaction approved under paragraph (5) might be consummated. The commencement of such an action shall stay the effectiveness of the agency's approval unless the court shall otherwise specifically order.

* * * * *

(C) Upon the consummation of a merger transaction in compliance with this subsection and after the termination of any antitrust litigation commenced within the period prescribed in this paragraph, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be attacked in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of Title 15 * * *.

STATEMENT

Michigan National Corporation ("Michigan National") is a bank holding company which controls five banks in Michigan, including appellee Michigan National Bank ("MNB") (App. A, *infra*, p. 2a). Michigan National decided to acquire four additional banks in Michigan.[2] It planned to accomplish this by

[2] The four banks are: First National Bank of East Lansing; Central Bank, N.A., of Grand Rapids; Valley National

a three-step procedure. First, it would obtain national bank charters for four "phantom" banks having no assets or deposits. Second, the four banks to be acquired would be merged into the phantom banks. Third, Michigan National would acquire the four merged banks.

Michigan National officials obtained charters for the phantom banks from the Comptroller of the Currency. The phantom and the real banks applied to the Comptroller of the Currency for approval of the mergers under the Bank Merger Act, 12 U.S.C. 1828(c). Michigan National also applied to the Federal Reserve Board for approval of the proposed acquisitions under the Bank Holding Company Act, 12 U.S.C. 1842(a)(3). The Board approved the aquisitions by a four-to-two vote on October 18, 1973 (App. F, *infra*, pp. 15a-24a), but the Comptroller has not yet acted on the mergers.

On November 14, 1973, the United States filed three complaints against Michigan National, MNB, and the bank to be acquired (one complaint covered the acquisition of two banks). Each complaint alleged that the proposed acquisition would violate Section 7 of the Clayton Act by eliminating substantial actual competition between MNB and the acquired bank (App. A, *infra*, p. 2a).

The appellees moved to dismiss the complaints on the grounds that, because the Comptroller had not yet approved the merger between the operating and

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Bank of Saginaw; and First National Bank of Wyoming (App. A, *infra*, p. 2a).

the phantom banks, the complaints were premature and there was no case or controversy. The United States opposed the motion. It contended that there is a case or controversy and that it would be improper to dismiss the actions without a determination of the merits because the 30-day period under the Bank Holding Company Act for filing a government antitrust suit might bar the United States from refiling the action after the Comptroller has acted. The United States suggested that the district court stay the proceedings until the Comptroller had acted on the merger applications (Transcript of Oral Argument, December 20, 1973, Tr. 38). Appellees then advised the court that they would not assert a statute of limitations defense in any subsequent government action challenging the proposed acquisitions (App. A, *infra*, pp. 5a, 8a).

The district court dismissed the actions without prejudice (App. B, *infra*, pp. 10a-11a). The court declined to decide whether the government's suit was premature or whether there was a case or controversy (App. A, *infra*, p. 5a). It noted that ripeness was "uncertain" because the Comptroller had not yet ruled on the mergers between the phantom banks and the real banks (App. A, *infra*, p. 5a). It recognized that, because Section 11(b) of the Bank Holding Company Act requires any antitrust suit challenging an acquisition approved by the Board to be filed within 30 days of the Board's approval, the government would have risked being barred by that provision if it had waited until the Comptroller acted (App. A, *infra*, p. 5a).

The court held, however, that it was "unnecessary to decide the merits" (App. A, *infra*, p. 5a). It ruled that the Bank Holding Company Act's 30-day limitation is not a jurisdictional bar but is a personal defense which the appellees could and did waive by their promise not to raise it in any later proceedings (App. A, *infra*, p. 7a). The court concluded that the government therefore would suffer no harm from dismissal (App. A, *infra*, p. 8a).

THE QUESTION IS SUBSTANTIAL

The district court's dismissal of the government's antitrust suits is a departure from the accepted and usual course of judicial proceedings which calls for an exercise of this Court's supervisory authority. The dismissal creates a needless risk that future government suits to prevent consummation of the proposed transactions will be barred by the statute of limitations. That risk could have been avoided, without prejudice to the appellees, by staying further proceedings instead of dismissing the suits. This Court should vacate the dismissal order of the district court and remand with instructions to that court to stay further proceedings until the Comptroller has acted.

The district court gave no adequate reason for its action. The court found it "unnecessary to decide the merits" of appellees' claim that the suits do not present a case or controversy (App. A, *infra*, p. 5a). The only explanation it gave was its conclusion that dismissal would not harm the government (App. A, *infra*, p. 8a).

That conclusion, however was unjustified.[3] The dismissals created a needless risk that the government may be precluded from challenging these transactions after the Comptroller has acted. The district court's decision rests upon its conclusion that the 30-day limitation in Section 11(b) of the Bank Holding Company Act is not a jurisdictional bar but only a personal defense which the appellees have waived (App. A, *infra*, p. 7a). But either this Court or some other district judge who might be called upon to decide a subsequent action against these acquisitions might reach the opposite conclusion. The court below implicitly recognized that the classification of this particular statute of limitations as a jurisdictional bar or a personal defense presents a difficult and novel question of statutory construction; no other court has ever considered the question (App. A, *infra*, pp. 6a-7a). The language of the statute is susceptible to either interpretation[4] and the legislative history is sparse.[5]

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[3] Even if justified, however, that conclusion would not warrant dismissal. A federal court is ordinarily obliged to decide cases within its jurisdiction, even though they might be dismissed without necessarily causing irreparable harm to either party. Cf. *Meredith* v. *Winter Haven*, 320 U.S. 228, 234.

[4] The grant to the Board and to state officials of the right to intervene in antitrust suits challenging an acquisition approved by the Board (12 U.S.C. 1849(c)) might be construed as some indication that the 30-day time limit is not a purely personal defense which the affected banks can assert or waive at their option.

[5] The 30-day limitation in Section 11(b) was an avowed copy of the comparable limitation in the Bank Merger Act

The district court could have avoided this dilemma without subjecting anyone to unnecessary litigation by staying all further proceedings until the Comptroller acts on the merger applications, as the government had requested. "[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254. If the Comptroller disapproves an application, the district court could then dismiss the pertinent suit as moot. If the Comptroller approves an application, the court could then decide the antitrust case.

In analogous circumstances, this Court has recognized that the proper action by the district court is to stay the antitrust suit, not to dismiss it. In *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, a shipper brought a private treble damage suit against a steamship conference, alleging that certain conference rates violated the antitrust laws because they had not been approved by the Federal Maritime Commission. The court of appeals affirmed

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(12 U.S.C. 1828(c)(6) and (7)), and Congress adopted it without presently relevant debate or discussion. S. Rep. No. 1179, 89th Cong., 2d Sess., pp. 9, 10. The legislative history of the Bank Merger Act, while showing that Congress intended the government to have a fair chance to bring an antitrust action against a proposed bank merger, is not informative on whether the 30-day limitation was jurisdictional or personal. See S. Rep. No. 299, 89th Cong., 1st Sess., p. 8; H. Rep. No. 1221, 89th Cong., 2d Sess., p. 1; 112 Cong. Rec. 2653.

the district court's dismissal of the suit "on the ground that such an action cannot be maintained until the Commission has passed upon the agreements * * *." *Id.* at 216. This Court reversed, holding that the court of appeals should have stayed the action until pending Commission proceedings to determine the legality of the conference's rate agreement had been completed. The Court distinguished cases in which it had approved dismissal of antitrust suits for injunctive relief until the Commission had acted, because in those cases "dismissal would not prejudice the plaintiff's right to obtain antitrust relief at the appropriate time," whereas the *Carnation* "claims are subject to the Statute of Limitations and are likely to be barred by the time the Commission acts." *Id.* at 222-223. See, also, *General Am. Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U.S. 422, 433.

In the present case, as shown above, dismissal of the government's antitrust suits could "prejudice the plaintiff's right to obtain antitrust relief at the appropriate time." *Carnation, supra.* In this case, as in *Carnation*, the district court should have stayed proceedings in the antitrust suits, not dismissed them. Such a stay could not possibly prejudice or burden the appellees.

CONCLUSION

The judgment of the district court should be vacated and the cases remanded with instructions to the district court to stay further proceedings in these suits until the Comptroller of the Currency acts on the bank merger application submitted by the four banks which Michigan National proposes to acquire.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
ROBERT B. NICHOLSON,
Attorneys.

MAY 1974.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 74-70665

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK and VALLEY NATIONAL BANK OF SAGINAW, DEFENDANTS

Civil Action No. 74-70666

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK, CENTRAL BANK, N.A., and FIRST NATIONAL BANK OF WYOMING, DEFENDANTS

Civil Action No. 74-70667

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK and FIRST NATIONAL BANK OF EAST LANSING, DEFENDANTS

OPINION AND ORDER

The court has before it motions to dismiss the complaints in the above three closely-related civil actions. The government has brought the actions in each case to enjoin certain bank mergers and acquisitions as violations of Section 7 of the Clayton Act, 15 U.S.C. § 18. Identical motions are presented in each case and, for purposes of discussion herein, they shall be treated as a single motion.

Defendant MICHIGAN NATIONAL CORPORATION is a bank holding company formed in 1971. Defendant MICHIGAN NATIONAL BANK is its subsidiary. They seek to acquire four additional banks: (1) FIRST NATIONAL BANK OF EAST LANSING; (2) CENTRAL BANK, NATIONAL ASSOCIATION, Grand Rapids; (3) VALLEY NATIONAL BANK OF SAGINAW; and (4) FIRST NATIONAL BANK OF WYOMING, all of which are national banks located in Michigan. To effectuate this acquisition, MICHIGAN NATIONAL CORPORATION first chartered new banks holding no assets or deposits. These "phantom banks" are then to be merged with the "real" banks sought to be acquired.

The significance of this process is that it involves both the merger of banks (i.e. "phantom banks" merge with "real" banks) and the acquisition of subsidiary banks (i.e. those resulting from the mergers) by a bank holding company. Bank mergers and bank holding company acquisitions are within the

jurisdictions of separate regulatory agency processes. Under the Bank Holding Company Act of 1956, 12 U.S.C. §§ 1841, et seq., the Board of Governors of the Federal Reserve System (BOARD) has responsibility for acquisitions of subsidiary banks by a bank holding company. 12 U.S.C. § 1842(a)(2). The holding company must apply to the BOARD for approval to make the acquisition. After the approval is granted, the BOARD notifies the Attorney General, who is then limited to 30 days from the date of the approval in which to commence an anti-trust action. (12 U.S.C. § 1849(b)).

However, under the Bank Merger Act of 1966, the Comptroller of the Currency (COMPTROLLER) is given authority to approve bank mergers such as those that are involved here between the "phantom" and the "real" banks. (12 U.S.C. § 1828(c)(2)). As in the case of bank holding company acquisitions, the Attorney General, after receiving notice of the COMPTROLLER's approval, is limited to 30 days in which to bring an anti-trust action based on a bank merger. (12 U.S.C. § 1828(c)(6)).

Pursuant to the requirements of the Bank Holding Company Act, Defendant MICHIGAN NATIONAL CORPORATION, in March, 1973, applied to the BOARD for its approval to acquire the "successors by merger" [1] to the four banks. On October 18, 1973, the BOARD approved these acquisitions. On November 14, 1973, within the 30-day limitation period of

[1] The term "successor by merger" refers to the resultant bank after the "phantom" bank merges with the "real" bank.

the Bank Holding Company Act, the government instituted these three anti-trust actions.

However, to date there has been no approval of the "phantom" bank mergers by the COMPTROLLER as provided for in the Bank Merger Act. Accordingly, the 30-day limitation applicable under that statute has not yet begun to run.

It is undisputed that the ultimate acquisition sought by the Defendants will not be accomplished as presently contemplated until the COMPTROLLER approves the mergers of the "phantom" with the "real" banks. The Defendants argue from this that the filing of the complaints was premature and that, because the disapproval of the COMPTROLLER would moot the case, there does not yet exist a case and controversy for the court to decide. The Defendants therefore ask that the complaints be dismissed without prejudice to the government's right to bring an anti-trust action within 30 days of the COMPTROLLER's approval of the "phantom" mergers.

The government disputes the merits of the Defendants' contention that the lawsuits are premature and further objects to the Defendants' proposed remedy on the grounds that any dismissal of this action would necessarily be prejudicial. In this connection, the government fears that, regardless of the timeliness of their renewed filing under the Bank Merger Act, such a refiling would be barred by the statute of limitations of the Bank Holding Company Act because more than 30 days have elapsed since the BOARD's approval. The government also

fears that, subsequent to a dismissal of the suits, the Defendants might change their method of effectuating the affiliation so as to obviate the need for the COMPTROLLER's approval.

In response to the government's position, the Defendants have offered assurances on the record that they will do nothing to obviate the need for the COMPTROLLER's approval. They also have promised on the record not to raise the statute of limitations of the Bank Holding Company Act as a defense to a refiled action subsequent to dismissal here. To this, the government responds that the statute of limitations is, or might be construed as, a jurisdictional bar which the Defendants cannot waive.

On its merits, the issue raised by the Defendants' motions presents a close question and is apparently one of first impression. The ripeness of this controversy appears uncertain, given the undisputed fact that the affiliation, as presently contemplated, could still be prevented by the action of the COMPTROLLER. On the other hand, the government's dilemma is obvious for, had it postponed instituting suit until after the COMPTROLLER's approval, then it would have risked being barred by the limitations of the Bank Holding Company Act.

This court is of the opinion that the position taken by the Defendants on the record fully protects the rights of the government to proceed with a lawsuit if and when the COMPTROLLER's approval is given and that this position makes it unnecessary to decide the merits of the question.

The great weight of authority is to the effect that a party may, by agreement or by necessary implication, waive a defense of a statute of limitations or be estopped from raising such a defense. This rule has been applied with respect to statutes of limitations set forth in specific Congressional enactments, *United States* v. *Krueger*, 121 F.2d 842 (3rd Cir. 1941), cert denied 314 U.S. 677; *Tokomenka, Inc.* v. *Toko Kaiun Kabushiki Kaisha*, 342 F.Supp. 292 (S.D. Texas 1972); *Monarch Industrial Corp.* v. *American Motorist Insurance Co.*, 276 F.Supp. 972 (S.D. N.Y. 1967); and, with respect to statutes of limitations generally, *United States* v. *Eytcheson*, 237 F.Supp. 371 (D. Mont. 1965); See generally 24 ALR 2d p. 1425. This rule has also been applied in federal anti-trust actions. *Girardi* v. *Gates Rubber Co., Sales Division*, 253 F.Supp. 690 (N.D. Cal. 1965); *Greve* v. *Gibraltar Enterprises*, 85 F.Supp. 410 (D. N.M. 1949).

The court recognizes that this rule is not universally accepted. It has been held that the limitations provisions of the Federal Employers Liability Act, 45 U.S.C. §§ 51-60, the Jones Act, 46 U.S.C. § 688, and the Suits in Admiralty Act, 46 U.S.C. § 745, can not be waived. *Osbourne* v. *United States*, 164 F.2d 767 (2d Cir. 1948); *Sgambati* v. *United States*, 172 F.2d 297 (2d Cir. 1949). However, these cases need not be read as having an application beyond the context of the statutes they construed.

It has also been held that limitations set forth in statutes creating actions against the United States

may not be waived or extended by agents of the United States. *Kruhmin* v. *United States*, 177 F.2d 906 (3rd Cir. 1949); *Kindrew* v. *United States*, 352 F.Supp. 277 (M.D. Fla. 1972). This exception has no application in the instant action.

Consistent with the broadly held general view, there appears no reason to construe the statute of limitations of the Bank Holding Company Act as a jurisdictional bar rather than a personal defense which can be waived or which a party by its conduct can be estopped from raising. To the contrary, in light of the procedural tangle created when these two banking statutes are, as here, applied in conjunction in a way not apparently anticipated by Congress, a view of the limitations provision as a waiveable personal defense rather than a substantive jurisdictional bar is particularly compelling.

In this court's opinion, the Defendants' voluntary relinquishment of the statutory benefit of the 30-day limitation by their express promise not to plead the statute must be viewed as a removal of the bar. See *United Fruit Company* v. *J. A. Folger & Co.*, 270 F.2d 666, 668 f.n. 1 (5th Cir. 1959), cert denied 362 U.S. 911 (1960).

Moreover, while it is conceivable that the Defendants might take steps to obviate the need for the COMPTROLLER'S approval (despite their assurances that they will not do so), the court is satisfied that such action would not jeopardize the government's rights to proceed in a subsequent lawsuit. The BOARD's approval was of the acquisitions of the suc-

cessors by merger to the four banks which the Defendants seek to acquire. If the Defendants were to modify their plans for the acquisition so as to obviate the need for the COMPTROLLER's approval of the mergers, the BOARD's approval would also be without effect, and new BOARD approval would be required. The timing of the government's refiling would be determined from this new BOARD approval.

Thus, no disability to the rights of the government can result from a dismissal without prejudice to the government's right to reinstitute suit either within 30 days of the approval, if any, of the COMPTROLLER, or within 30 days of possible subsequent approval by the BOARD, at which time, in either case, no doubts will remain as to the ripeness of this controversy for judicial intervention.

In conclusion, the Defendants, having represented to the court and to the government that they will not assert the defense of the limitations period of the Bank Holding Company Act in subsequent litigation on these matters, and the court having found that these representations effectively estop Defendants from asserting such a defense;

IT IS THEREFORE ORDERED that the Defendants' motions to dismiss be GRANTED and the complaints be DISMISSED without prejudice.

/s/ Lawrence Gubow
LAWRENCE GUBOW
U. S. District Judge

Dated: Feb. 19, 1974

A True Copy
HENRY R. HANSSEN
Clerk

/s/ By [Illegible]
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No. 74-70665

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK and VALLEY NATIONAL BANK OF SAGINAW, DEFENDANTS

Civil Action No. 74-70666

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK, CENTRAL BANK, N.A., and FIRST NATIONAL BANK OF WYOMING, DEFENDANTS

Civil Action No. 74-70667

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK and FIRST NATIONAL BANK OF EAST LANSING, DEFENDANTS

JUDGMENT

Pursuant to the opinion rendered by this court in the above-styled cases on February 19, 1974, the motions of the Defendants to dismiss the complaints are GRANTED, and

IT IS ORDERED that the above-entitled actions be, and the same hereby are, DISMISSED without prejudice.

/s/ Lawrence Gubow
LAWRENCE GUBOW
U. S. District Judge

Dated: Feb. 19, 1974

A True Copy
HENRY R. HANSSEN
Clerk

/s/ By [Illegible]
Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Civil No. 74-70665

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK and VALLEY NATIONAL BANK OF SAGINAW, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the final judgment entered February 19, 1974, dismissing the complaint in this action.

CARL D. LAWSON,

ROBERT B. NICHOLSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

April 12, 1974

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Civil No. 74-70666

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK, CENTRAL BANK, N.A., and FIRST NATIONAL BANK OF WYOMING, DEFENDANTS.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the final judgment entered February 19, 1974, dismissing the complaint in this action.

CARL D. LAWSON,

ROBERT B. NICHOLSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

April 12, 1974

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

Civil No. 74-70667

UNITED STATES OF AMERICA, PLAINTIFF

v.

MICHIGAN NATIONAL CORPORATION, MICHIGAN NATIONAL BANK, and FIRST NATIONAL BANK OF EAST LANSING, DEFENDANTS.

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
BY THE UNITED STATES OF AMERICA

Notice is hereby given that the United States of America, plaintiff herein, appeals to the Supreme Court of the United States, under the Expediting Act, 15 U.S.C. Section 29, from the final judgment entered February 19, 1974, dismissing the complaint in this action.

CARL D. LAWSON,

ROBERT B. NICHOLSON,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

April 12, 1974

APPENDIX F

FEDERAL RESERVE SYSTEM

MICHIGAN NATIONAL CORPORATION

Order Approving Acquisitions of Banks

Michigan National Corporation, Bloomfield Hills, Michigan, a bank holding company within the meaning of the Bank Holding Company Act, has applied for the Board's approval under § 3(a)(3) of the Act (12 U.S.C. 1842(a)(3)) to acquire the successors by merger to the following four banks: (1) First National Bank of East Lansing, East Lansing ("East Lansing Bank"); (2) Central Bank, National Association, Grand Rapids ("Central"); (3) Valley National Bank of Saginaw, Saginaw ("Valley"); and (4) First National Bank of Wyoming, Wyoming ("Wyoming Bank"), all of which are located in Michigan. The banks into which the four named Banks are to be merged have no significance except as a means to facilitate the acquisition of the voting shares of Banks. Accordingly, the proposed acquisitions of shares of the successor organizations are treated herein as the proposed acquisitions of the shares of the four Banks.

Notice of the applications, affording opportunity for interested persons to submit comments and views, has been given in accordance with § 3(b) of the Act. The time for filing comments and views has expired, and the Board has considered the applications and

all comments received in light of the factors set forth in § 3(c) of the Act (12 U.S.C. 1842(c)).

Applicant controls five banks with aggregate deposits of $2.38 billion, representing about 9.5 per cent of deposits of commercial banks in Michigan.[1] Acquisition of East Lansing Bank (deposits of $16.5 million), Central (deposits of $42.9 million), Valley (deposits of $43.2 million), and Wyoming Bank (deposits of $15.9 million) would change Applicant's rank from the third largest banking organization in Michigan to the second largest but would add only about 0.5 per cent of total deposits in Michigan to its control. Moreover, two other banking organizations would be approximately the same size as Applicant, and Applicant would be only a little more than half the size of the leading organization in Michigan. For these reasons, approval of the acquisitions would not significantly alter the existing concentration of banking resources in the State.

Both the Department of Justice ("Justice") and the Commissioner of the Michigan Financial Institutions Bureau ("Commissioner") commented on these applications. Justice, asserting that the banking markets in question were already concentrated and that approval of the applications would eliminate substantial existing competition, recommended denial of all four applications. The Commissioner also stated

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[1] All banking data are as of December 31, 1972, unless otherwise noted, and represent bank holding company acquisitions and formations approved by the Board through August 31, 1973.

that the concentration in the four banking markets was high and further indicated that approval of the applications would give Applicant substantially increased branching opportunities which would help to increase its dominance over other organizations in the markets. The Commissioner recommended against approval of the four applications.[1a] Both Justice and Commissioner recognized that a profit sharing trust for the employees of Applicant's lead bank held varying interests in the four banks. However, the Commissioner and Justice felt that Applicant did not have control of the four banks in question.

Applicant replied by stating that approval of the four applications would not affect its relative ranking in any of the three markets in question. Moreover, Applicant stated that the concentration was no greater in these markets than in other Michigan Standard Metropolitan Statistical Areas. Applicant argued that approval of the applications would enable it to provide greater convenience of services in the relevant banking markets. Additionally, Applicant stressed that it has close relationships with the four banks in question, that it has either helped form or expand the four banks, and that it has provided management services throughout their existences.

[1a] The Commissioner is not the supervisory official whose denial recommendation requires a hearing pursuant to § 3(b) of the Bank Holding Company Act since all the four banks sought to be acquired are national banks. Moreover, the recommendation was not received within the thirty-day time period as required by § 3(b).

The Board has concluded that approval of these four applications would not have a substantially adverse effect on the concentration of banking resources in Michigan. The Board must also consider whether analyses of the relevant local markets indicates there are substantial anticompetitive effects that would result from approval of any or all of these applications. In the Saginaw banking market, Valley presently ranks as the fourth largest banking organization with approximately 7 per cent of market deposits.[2] The lead bank of Applicant has one office in the market with about 28.5 per cent of market deposits. However, under present law Applicant's lead bank may not open any new branches in the Saginaw area, a constraint which has the effect of inhibiting its growth in that area. For example, in the 4-year period from June, 1968, to June, 1972, deposits of this one branch grew only about 4.5 per cent while the Saginaw banking market deposits grew approximately 14 per cent. As a consequence of this relatively limited growth, the market share of this branch fell almost 2.5 per cent during this 4-year period. It seems likely that the market share of this branch will continue to fall since its competitors can branch into locations preferred by more depositors while it must offer its services from a single location. Moreover, the Board recognizes that the largest banking organi-

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[2] All banking data for the local markets involved in this case are as of June 30, 1972. The Saginaw banking market is approximated by the northeastern two-thirds of Saginaw County.

zation in this market controls approximately 50 per cent of market deposits and *increased* its market share over the previously referred to 4-year period. Permitting Applicant to acquire Valley would give it the ability to branch throughout the area and provide greater service conveniences and also increased competition for the dominant organization in the market. The Board also recognizes that Applicant, through the employee trust fund of its lead bank, has a substantial interest in Valley at the present time with the trust owning 24.52 per cent of Valley's voting shares. Applicant also has representatives on Valley's board of directors and has previously provided Valley with needed managerial assistance. In view of these facts, the Board concludes that the competitive considerations are, on the whole, procompetitive and, therefore, consistent with approval of the application.

Both Central and Wyoming Bank are located in the Grand Rapids banking market with the former controlling approximately 3 per cent and the latter about 1 per cent of market deposits.[3] Here, as in the Saginaw banking market, the lead bank of Applicant operates one branch. This office controls about 17.5 per cent of market deposits. However, similar to the situation in Saginaw, this is the only branch that is permitted to Applicant's bank in this market while the two largest banks have unlimited branching rights

[3] The Grand Rapids banking market is approximated by the southern three-fourths of Kent County and the eastern half of Ottawa County.

in the city and, in fact, have 26 and 16 offices. The Grand Rapids banking market is dominated by these two large organizations which control over 70 per cent of deposits between them, with the largest organization accounting for approximately 50 per cent of this total. Because of the limitations on its ability to branch, Applicant's lead bank has grown at a much slower rate than either of these two organizations. The Board believes that the public would be better served if the Applicant had branching capabilities in this market competitive with those of the two dominant organizations. Applicant has shown itself to be an aggressive competitor and, given an equal competitive footing, it may be able to make some inroads into the concentrated market structure. Moreover, Applicant, again through the employee trust fund of its lead bank, has substantial interests in both Wyoming Bank and Central, having 22.3 per cent of the voting shares of the former and 21.9 per cent of the voting shares of the latter. The trust also owns 46.1 per cent of the preferred stock of Wyoming Bank. Applicant's lead bank has provided management assistance to both of these banks, particularly to Wyoming Bank at a time when it needed outside help. For these reasons, the Board concludes that competitive considerations offer no impediment to approval of the two applications.

East Lansing Bank and Applicant's lead bank both have their head office in the same banking market.[4] East Lansing Bank is a comparatively small factor in this market, having only about 2 per cent of market deposits. Since its establishment in 1955 with the help of Applicant's lead bank, it has not shown itself to be a particularly aggressive organization, only recently opening two branches. Though Applicant has the largest market share in the relevant banking market with approximately 41 per cent of deposits, it presently cannot branch into the East Lansing Bank's sector of this market due to home office protection laws. In the East Lansing Bank's sector of the market, East Lansing Bank is much smaller than the other bank with headquarters there. Approval of this application may enable more vigorous competition to result in this part of the market. Moreover, Applicant's lead bank assisted in the establishment of East Lansing Bank, currently has representatives on the board of directors, and the employee trust fund owns 12.85 per cent of the voting shares of East Lansing Bank. These facts indicate that Applicant has a great deal of influence over East Lansing Bank and the latter cannot be considered to be an entirely independent entity. Given the small size of East Lansing Bank and Applicant's present influence over it, the Board does not consider that substantially adverse effects on competition would result from ap-

[4] The relevant banking market is approximated by the Lansing SMSA, which includes Clinton, Eaton, and Ingham Counties.

proval of this application. Accordingly, the Board concludes that competitive considerations are consistent with approval.

It appears appropriate at this point to discuss the relevance of the holdings of the employee trust fund in each of these four banks. The employee trust's investments in the stock of the banks proposed to be acquired here is a circumstance over which one of the dissenters to the Board's approval action has expressed concern. The Board's approval of the Applicant's acquisition of banks in which the employees trust fund of Applicant's lead bank has previously invested is premised upon the following considerations, among others. The trust fund's interest in each of the banks was acquired prior to the time when this Board was given statutory oversight responsibility with respect to the Applicant. The present record contains no suggestion that the trust's investments have not been, in all respects, prudent, financially satisfactory, and in the best interest of the beneficiaries of the trust. Nor is there evidence of any abuse by the trustees of their fiduciary responsibilities under the trust, nor of control of their investment decisions by Applicant or its lead bank. Moreover, the Board's approval actions here should not be read as indicating automatic approval of such investments; rather, approval in these cases is based somewhat on the positive competitive and convenience benefits that would result from consummation of these transactions.

The financial condition and managerial resources and prospects of Applicant, its subsidiaries, and the

four banks are generally satisfactory and consistent with approval of the applications. Considerations relating to the convenience and needs of the communities to be served lend some weight for approval of the applications since consummation of the transactions will enable Applicant to provide services at additional locations within the communities. It is the Board's judgment that the proposed transactions are in the public interest and should be approved.

On the basis of the record, the applications are approved for the reasons summarized above. The transactions shall not be consummated (a) before the thirtieth calendar day following the effective date of this Order or (b) later than three months after the effective date of this Order unless such period is extended for good cause by the Board or by the Federal Reserve Bank of Chicago pursuant to delegated authority.

By order of the Board of Governors,[5] effective October 18, 1973.

/s/ Chester B. Feldberg
CHESTER B. FELDBERG
Secretary of the Board

[SEAL]

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[5] Approval of acquisition of First National Bank of East Lansing, East Lansing; Central Bank, National Association, Grand Rapids; and Valley National Bank of Saginaw, Saginaw. Voting for this action: Chairman Burns and Governors Mitchell, Daane, and Sheehan. Voting against this action: Governors Brimmer and Holland. Absent and not voting: Governor Bucher.

Approval of acquisition of First National Bank of Wyoming, Wyoming. Voting for this action: Chairman Burns and Governors Mitchell, Daane, Brimmer, Sheehan, and Holland. Absent and not voting: Governor Bucher.

DISSENTING STATEMENT OF GOVERNOR BRIMMER

I must dissent from the majority's approval of the applications to acquire the (1) East Lansing Bank, (2) Central, and (3) Valley. The majority concedes that these three banks are all located in markets where Applicant's lead bank has a substantial position. In other words, this is not a case of potential competition; its adverse impact is primarily on existing competition.

The Board's approval of the East Lansing Bank's acquisition will mean that Applicant will have almost 43 per cent of the market deposits in the Lansing banking market. This type of dominance may perhaps be expected when banking markets are small, a circumstance not here involved. As of June 30, 1972, the Lansing market had $784.5 million of deposits. The majority should be interested in seeing these deposits spread out among several organizations rather than allowing one large organization to expand an already dominant position. The majority alludes to the fact that the employee trust fund has an interest in the voting shares of East Lansing Bank. However, this interest is only 12.85 per cent of such voting shares. Moreover, these shares are held in a fiduciary capacity; that is, they must be used to further the interests of the beneficiaries of the trust, not those of Applicant. It is unfortunate that the majority appears to sanitize what it must otherwise surely concede would be an anticompetitive application by

referring to this control relationship. The Board in previous cases (particularly in the applications of First City Bancorporation of Texas, Inc., 1973 Federal Reserve Bulletin 105) has chosen to disregard voting interests of Applicants held in competing banks where there is a probability that disaffiliation may occur over a reasonable period of time and where the competitive consequences of consummation of the transaction would be substantially adverse. Moreover, in the First City cases, Applicant held absolute interests in the banks rather than holding interest in a trust capacity. The majority is now placing its stamp of approval on what must be considered a use of trust assets with potential conflict of interests problems. I do not believe that an employee trust fund should be used to forward the competitive interests of an organization whose employees are beneficiaries of the investing trust. I cannot help but feel this is what has happened in this case where the assets of the trust fund were used to acquire additional competitive outlets in markets where Applicant's lead bank was represented.

The majority refers to the fact that the East Lansing bank has not been aggressive. However, figures indicate that from June, 1968, to June, 1972, East Lansing's deposits grew at a rate 50 per cent higher than the average for the market. Additionally, I cannot understand the majority's reference to the increased competition that may result from approval of this application in the East Lansing sector of the market. Offices of Applicant's lead bank and the East

Lansing Bank are located within three miles of one another. East Lansing is not an isolated section but is clearly a central part of the larger Lansing banking market. Branches of Applicant's lead bank completely surround it. It is to disregard reality to separate East Lansing from its larger setting. The Lansing market is also an increasingly concentrated one; from June, 1968, to June, 1972, the market share of the three largest banks went from 73 to about 82 per cent of market deposits. The Board should be concerned about even small increases in concentration in such a market.

I do not find the approval of the applications of the Central and Valley banks to be any more salutary. Applicant's lead bank has a branch in Grand Rapids with total deposits of about $225 million, making it the third largest competitor in the market. In approving the application of both the Central and Wyoming Bank in the Grand Rapids banking market, the Board is giving Applicant three different organizational outlets in that market and is foregoing the opportunity to approve the acquisition of the Wyoming Bank contingent upon divestment of Applicant's influence on Central. The majority stresses the fact that in the Grand Rapids market the two largest organizations control over 70 per cent of market deposits. Yet, the majority fails to point out that after approval of these two applications the three top organizations in the Grand Rapids market (which, of course, includes Applicant) will control over 90 per cent of market deposits. Moreover, this is in

the context of an increasing trend toward concentration in the Grand Rapids banking market. The three largest organizations in Grand Rapids controlled approximately 78 per cent of market deposits in June, 1968. Four years later, their share had grown to 89 per cent of market deposits. This adverse trend will be accelerated by approval of the two applications here.

The situation in the Saginaw market is not much better. Approval of the application of Valley will give Michigan National approximately 35.5 per cent of market deposits. This means the two largest organizations in Saginaw will control almost 85 per cent of market deposits. Again, Saginaw is not a small banking market where one may expect such large market shares; rather, it has $437.6 million of deposits.

I must conclude, as I did with regard to the East Lansing bank application, that approval of the acquisition of Central and Valley gives the Board's blessing to the use of assets held in a fiduciary capacity to cement an anticompetitive concentration of banking resources. I believe that such a use should not be countenanced. I am not saying that an employee trust fund of a bank cannot invest in bank stock. The trustees of such a fund are probably more knowledgable concerning investments in this type of stock than any other. However, I feel that investments should not be made in the stock of banks that compete with the bank whose employees are beneficiaries of the trust. Aside from fostering anticompetitive

market situations, this raises the spectre of conflict of interest. The trustees may not adhere to their fiduciary responsibilities in ambiguous situations and, instead, may give impermissible consideration to the interests of their employer. Again, it must be pointed out that all the trustees of this trust are officers of Applicant's lead bank. The Board, in these times of sensitivity of conflict of interest questions, should be doubly careful not to appear to approve the potential for such practices.

DISSENTING STATEMENT OF GOVERNOR HOLLAND

I dissent from the majority's approval of the applications to acquire the (1) East Lansing Bank, (2) Central, and (3) Valley.

These banks are all located in sizable but highly concentrated markets in which Applicant's lead bank already has a substantial position. Information in the record persuades me that each of these three banks would be an attractive acquisition conferring some market advantages upon any banking organization able to affiliate effectively with it.

I cannot escape the judgment that, over the long run, the banking markets of Grand Rapids, Lansing, and Saginaw would be more competitive and the public better served if the three banks in these respective areas over which Applicant proposes to establish firm control were, in the alternative, operated as independent banks or were sold to other vigorous Michigan banking organizations not now represented in these markets. I believe such a course of events should not be regarded as impractical or improbable despite the ownership of some shares of stock in each bank by the employees trust fund of Applicant's lead bank. Such ownership conveys no legal right for the Applicant to control these banks and the trustees can justifiably hold such shares only so long as it serves the best interests of the trust beneficiaries to do so.

I should add that I would not vote to bar Applicant from expanding its geographic scope in the Grand Rapids or Saginaw markets either by foothold acqui-

sition or *de novo* entry. This is implicit in my vote to approve Applicant's acquisition of Wyoming Bank which is of a foothold type. However, like Governor Brimmer, I feel that Applicant's expansion in the Lansing market should be limited to a *de novo* type because of the extent of its existing dominance in that market.

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